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EXEMPT FROM FILING FEES
[GOVERNMENT CODE § 6103]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CRUZ

SANTA CRUZ COUNTY GREENWAY,

Petitioner,

v.

SANTA CRUZ COUNTY REGIONAL TRANSPORTATION COMMISSION,

Respondent.

PROGRESSIVE RAIL INCORPORATED; ST. PAUL & PACIFIC RAILROAD COMPANY, LLC; and DOES 1-10,

Real Parties in Interest.

Case No. 18CV02101

RESPONDENT'S OPPOSITION TO PETITIONER'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE

California Environmental Quality Act (CEQA)

ASSIGNED FOR ALL PURPOSES:
The Hon. Paul Burdick

Hearing Date: December 14, 2018
Time: 9:00 a.m.
Dept.: 5

Filing Date of Action: July 19, 2018

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I. INTRODUCTION

In 2012, using $11,000,000 in State transportation bond funds and other funding, the Santa Cruz County Regional Transportation Commission (RTC) acquired ownership of the physical assets of the Santa Cruz Branch Rail Line (Branch Line), a 31-mile line of railroad tracks and facilities with a long history of private freight rail operations. RTC did not acquire the right to undertake freight operations itself, but contracted with a private operator which acquired an easement to conduct freight service on the line directly from RTC's (private) predecessor. When the private freight operator failed midway through the term of the contract, RTC needed to select a replacement operator to continue operations on the line. In June 2018, RTC selected Real Parties in Interest Progressive Rail Inc. and St. Paul & Pacific Railroad Company, LLC (collectively, St. Paul) to take over the existing freight operations under an administration, coordination and licensing agreement (ACL). St. Paul acquired the freight easement directly from the prior operator.

Independent of that simple change in operators, RTC also had to address serious damage to the physical assets of the line from the 2016-2017 winter storms. Before RTC selected St. Paul to assume operations, RTC had already applied to the Federal Emergency Management Agency (FEMA) to obtain federal disaster relief funds for emergency repairs. RTC's subsequent approval of the ACL was not a decision about whether to repair the damaged track; it had already committed to that. RTC's action was a simpler decision: which new private rail operator would succeed the failed operator.

Notwithstanding these facts and circumstances, Petitioner Santa Cruz County Greenway (Greenway) has seized on this mundane event to launch an ill-conceived challenge aimed at all sorts of issues not resulting from RTC's selection of a replacement freight operator. If, for example, Greenway objects to the federally-funded track repair, its challenge is far too late. If Greenway objects to private rail operators continuing to carry out freight service, its challenge is preempted by federal law.[1]

Finally, if Greenway is really trying to get ahead of future decisions RTC may consider for the long-term use of the Branch Line based on the upcoming Unified Corridor Investment Study (UCIS), then its challenge is premature. For all of these reasons, Greenway's petition should be denied.

[1]/ RTC joins in the arguments presented in St. Paul's separate opposition brief.

II. STATEMENT OF FACTS

The Branch Line is an approximately 31-mile rail corridor between Watsonville (milepost [MP] 0.4) and Davenport (MP 31.4) in Santa Cruz County. (AR 3162.)[2] Before RTC acquired the Branch Line, it was owned and operated by Union Pacific Railroad (UPRR). (AR 3773, 3778, 3162.)[3] No one challenged RTC's decision to acquire the line.

A. RTC's Acquisition of the Branch Line

RTC completed an Initial Study before acquiring the Branch Line and determined that its acquisition and continued freight rail service by a private operator was exempt from CEQA review. (AR 3889–4080 [Initial Study], 3695–3696 [2010 Notice of Exemption (NOE)].) As the NOE notes, "The [Branch] Line already has freight service." (AR 3695–3696.) In May 2010, RTC made the formal decision to purchase the Branch Line. (AR 935; see AR 3593–3694 [purchase and sale agreement].)

In January 2011, The California Transportation Commission (CTC) approved expenditure of Proposition 116 transportation bond funds and other funds by RTC for the purpose of purchasing the Branch Line in order to "preserv[e] the rail corridor for future multi-modal uses, including continuation of existing freight and recreational service," and subject to the condition that if RTC ceases to utilize the line as approved—it would have to repay the State. (AR 2430, 2432, 2428–2432, 2433–2437 [CTC Reso. PA-10-06], 935–936; see AR 1199, 1203.) As part of its funding application, RTC committed to "continu[e] freight rail service for as long as would be required by the Surface Transportation Board [STB]."[4] (AR 2437, 1203.)

In October 2012 RTC completed the purchase of the Branch Line from UPRR. (AR 3437–3534 [quitclaim deed].) Although RTC acquired the physical assets of the Branch Line, it did not acquire the federal right and legal obligation to provide freight rail service. (AR 3583–3588 [STB Decision], 3586, 3587, 1205; see AR 3437.) UPRR expressly reserved to itself a freight easement along with its common carrier obligations under federal law. (AR 3437, 3437–3534, 3586, 1206, 1207.) The quitclaim deed transferring the Branch Line from UPRR to RTC expressly provides that:

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[2]/ "AR 1619" refers to Administrative Record ("AR") page 1619.

[3]/ In 2004, eight shippers along the Branch Line generated approximately 4,800 freight carloads each year for UPRR. (AR 3781.)

[4]/ The federal Surface Transportation Board has exclusive jurisdiction over railroads. (See AR 3699.)

> "[s]ubject to the terms and conditions below, Grantor [UPRR] excepts from the Property hereby quitclaimed and reserves unto itself, its successors and assigns, forever, an exclusive easement upon, over, under and across the Property, extending ten (10) feet on either side of the center line of the existing tracks and including rights of access along the length thereof, for the purposes of conducting freight rail operations and otherwise to fulfill Grantor's rights and obligations as a common carrier freight railroad under applicable federal rights and regulations, including the right to use the Property to provide freight rail service to all customers on or served by the Property, and to operate, use, construct, reconstruct, maintain, repair, relocate, and/or remove existing and/or future railroad, rail and railroad-related equipment, facilities and transportation systems necessary for and related to freight rail operations (the "[f]reight [e]asement").

(AR 3437.)

UPRR later conveyed its privately-held right to operate freight service to Iowa Pacific Holdings (IPH) (operating as Santa Cruz and Monterey Bay Railway), giving IPH the rights and obligations to conduct freight rail operations on the Branch Line as a common carrier, subject to STB's approval. (AR 3348–3436 [assignment of freight easement], 2405, 3585, 3586; see AR 3589–3592 [STB Order approving IPH as the operator].) STB issued a declaratory order stating that acquisition of the physical assets of the Branch Line would not cause RTC to become a rail carrier. (AR 3585–3588 [STB Order].)

B. IPH's Operation of the Branch Line

In September 2012, as the owner of the Branch Line, RTC authorized IPH to operate recreational passenger rail service subject to the terms of an ACL. (AR 3535–3584.) IPH's rights to operate passenger service were conditioned on an obligation to provide a minimum level of freight service, below which RTC had a right to terminate the agreement. (AR 2406, 3556–3557 [section 8.2].)

During its tenure as operator, freight carloads handled by IPH ranged from 129 to 660 annually, averaging 352 per year. (AR 2406, 3257 [IPH quarterly report], 3084 [same].) IPH also operated passenger excursions along portions of the Branch Line during the holidays. (AR 3172.)

Sometime in 2017, IPH became unable to meet its obligations under the 2012 ACL—failing to adequately maintain and repair the line and failing to pay license fees owed to RTC for storage of rail cars. (AR 2404, 507–508, 13.) IPH further failed to fulfill its federal common-carrier obligations or address a number of track defects identified by the Federal Railroad Administration (FRA). (AR 13–14, 507–508, 509–510, 2404.) Rather than seek STB approval to abandon freight service on the Branch Line, IPH agreed to cooperate with RTC to find a replacement operator. (AR 509–510, 504, 511.)

C. RTC's Consideration of a New Operator and ACL

In December 2017, RTC issued a request for proposals (RFP) seeking a replacement rail operator. (AR 3162–3258 [RFP].) As explained in the RFP, the selected proposer would assume the freight rail easement from IPH and, subject to approval by the STB, would obtain from RTC the right to operate recreational passenger service on the Branch Line. (AR 3163–3164.) RTC received five responses, including a proposal from St. Paul. (AR 504–506 [staff report].)

In January 2018, RTC considered the selection of St. Paul as the preferred operating entity. (AR 501 [agenda item 20].) Following public comment, RTC selected St. Paul as the preferred entity and authorized the negotiation of the ACL. (AR 1179–1180 [minutes], 10–11.)

In May 2018, RTC released the draft ACL for public review. (AR 12.) In response to public comments related to the pending UCIS[5], RTC structured the ACL as a two-phase agreement to ensure that a reliable operator can take over operations, while retaining the flexibility RTC needs to make its future decision on the UCIS. (AR 640–641, 3043–3083 [draft ACL] 3045 [section 2.1 (Phase I)], 2963 [same], 3046 [section 2.4.1 (Phase II)], 2964 [same].) Phase I authorizes freight service only. (AR 3045, 2963, 650.) If, upon completion of the UCIS, RTC determines that the Branch Line should not be used for freight service, RTC may seek STB approval to terminate the ACL. (AR 2979.) If RTC decides to pursue passenger rail service on the Branch Line, it may grant St. Paul authorization to operate passenger service[6] as Phase II of the ACL. (AR 3046, 2964, 647.)

On June 14, 2018, RTC approved the ACL, authorized execution of the agreement, and issued a NOE stating that the ACL was categorically exempt from CEQA review under the Class 1 and Class 2 exemptions. (AR 861 [meeting minutes], 6 [agenda], AR 12–13 [staff report].) RTC posted the NOE on June 15, 2018. (AR 1.)

Throughout the administrative process, RTC responded in writing to objections and concerns submitted by Greenway, clarifying that RTC, as owner of only the physical assets of the Branch Line, has no authority to interfere with the railroad operator's privately-held right to operate freight service.

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[5]/ The UCIS evaluates the viability of passenger rail on the Branch Line as one part of a comprehensive approach to improving Santa Cruz County's north-south transit corridor. (AR 2439.)

[6]/ The term "transportation service" is defined as the transportation of passengers, i.e., passenger service, in the ACL. (AR 2963 [section 1.17].)

(AR 2404–2409, 1197–1208.) RTC counsel further explained the legal and factual bases for RTC's determinations that the ACL is categorically exempt from CEQA and that no unusual circumstances exist. (AR 2406–2407, 1199–1203.) Greenway still filed suit. (See AR 1196.)

D. Storm Damage Necessitated FEMA-Funded Repairs

In winter 2016–2017, California experienced historic rain and flooding which caused severe damage to the Branch Line from fallen trees, landslides, and erosion within the railroad right-of-way, rendering it temporarily impassable. (See AR 3088.) In April 2017, RTC decided to apply to FEMA for public funding, which was subsequently approved, for emergency disaster assistance to repair storm damage on the line. (AR 3312 [April 6, 2017 resolution], 3309–3311 [application], 3088, 2337–2340 [approval letter].) At its regularly noticed and agendized public hearing on January 18, 2018, RTC authorized a contract with a local engineering firm for preparation of construction documents to restore the Branch Line to pre-storm condition. (AR 3091 [Reso. No. 13-13], 3088–3091 [staff report], 499 [agenda item no. 7].) Greenway did not object to RTC's application for federal emergency repair funds or RTC's decision to contract for the repair work.

III. STANDARD OF REVIEW

A court's inquiry into whether an agency has complied with CEQA "extend[s] only to whether there was a prejudicial abuse of discretion," which "is established if the agency has not proceeded in a manner required by law or if the … decision is not supported by substantial evidence." (Pub. Resources Code, § 21168.5.)

CEQA applies only to "discretionary" activities. (Pub. Resources Code, § 20180, subd. (a).) To determine whether an action is "discretionary," courts apply a functional test that examines "whether the agency has the power to shape the project in ways that are responsive to environmental concerns." (*Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 302.) The question of whether an activity constitutes a project is a question of law, to be decided on undisputed facts in the record. (*Union of Medical Marijuana Patients, Inc. v. City of Upland* (2016) 245 Cal.App.4th 1265, 1273 (*UMMP*).) If there are determinations of fact relevant to the question of whether an agency action is a project, those factual determinations should be reviewed for support by substantial evidence. (*Ebbetts Pass Forest Watch v. Cal. Dept. of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 954.)

An agency's decision to proceed with some level of CEQA review does not bar the agency from asserting in litigation that the activity is not a project subject to CEQA. (*Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 700.) If the agency relies on a categorical exemption, the court reviews the record to determine (a) whether, in finding the proposed project categorically exempt, the agency did not proceed in the manner required by law, or (b) the record does not contain substantial evidence supporting the exemption determination. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1110 (*Berkeley Hillside I*).) The "'interpretation of the language of the [CEQA] Guidelines or the scope of a particular CEQA exemption'" presents a '"'question of law subject to de novo review by this court.'"' (*Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809, 817 (*Walters*), quoting *Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 693 (*Save Our Carmel River*).) "But '[w]here the record contains evidence bearing on the question whether the project qualifies for the exemption, such as reports or other information submitted in connection with the project, and the agency makes factual determinations as to whether the project fits within an exemption category, we determine whether the record contains substantial evidence to support the agency's decision.'" (*Id*. at p. 817, quoting *Save Our Carmel River*, *supra*, 141 Cal.App.4th at p. 694; see *Dehne v. County of Santa Clara* (1981) 115 Cal.App.3d 827, 842 [substantial evidence test applied to exemption determination]; *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115 (*Davidon*) [exemption determination "will be affirmed if supported by substantial evidence that the project fell within the exempt category of projects"].)

If the agency points to substantial evidence in the record showing that the project falls within the scope of a categorical exemption, then the burden shifts to the party challenging the exemption to show that the project is not exempt because one of the exceptions listed in CEQA Guidelines[7] section 15300.2 applies. (*Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Agricultural Assn.* (2015) 242 Cal.App.4th 555, 568 (*Citizens*); *Berkeley Hillside Preservation v. City of Berkeley* (2015) 241 Cal.App.4th 943, 955–956.) Thus, if "there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances," the categorical exemption

[7] / "CEQA Guidelines" refers to the State CEQA Guidelines, Cal. Code Regs., title 14, § 15000 et seq.

does not apply. (CEQA Guidelines, § 15300.2, subd. (c).) To show that the project, otherwise exempt, falls within this exception, the petitioner must "'prove both unusual circumstances and a significant environmental effect that is due to those circumstances.'" (*Walters*, *supra*, 1 Cal.App.5th at p. 819; see Section IV.D.1, *infra*.) "A negative answer to the question of whether there are unusual circumstances means the exception does not apply." (*Citizens*, *supra*, 242 Cal.App.4th at p. 588, fn. 4.) Whether there are "unusual circumstances" is a factual determination for the agency, reviewed for substantial evidence. (*Berkeley Hillside I*, *supra*, 60 Cal.4th at p. 1114.) If the agency determines there are "unusual circumstances," then the possibility that there may be a significant impact on the environment due to those unusual circumstance is subject to the "fair argument" standard of review. (*Ibid*.)

Alternatively, a petitioner "may establish an unusual circumstance with evidence that the project *will have* a significant environmental effect." (*Berkeley Hillside I*, *supra*, 60 Cal.4th at p. 1105, italics added.) "'When it is *shown* that a project otherwise covered by a categorical exemption *will* have a significant environmental effect, it necessarily follows that the project presents unusual circumstances.'" (*Id*. at pp. 1105–1106.) "'[A] showing by substantial evidence that a project *will have* a significant effect on the environment satisfies both prongs of the unusual circumstances exception'" (*Walters*, *supra*, 1 Cal.App.5th at p. 820.)

IV. ARGUMENT

A. Selection of an operator is not subject to CEQA because as owner of only the physical assets of the Branch Line, RTC lacks the authority to regulate freight service in response to environmental concerns.

First and foremost, Greenway ignores the legal context under which freight service operates on the Branch Line. Simply put, RTC is precluded from operating or regulating freight service. (See AR 3585–3589 [STB Order], 3437 [freight easement], 3348–3436 [freight easement assignment].) RTC does not hold the rights to operate freight service on the Branch Line. (See AR 3437, 1205, 1205–1208.) UPRR reserved to itself the separate right to continue freight operations on the line when RTC acquired the line from UPRR. (AR 3437 [freight easement].) UPRR then conveyed its right to IPH, which then conveyed it to St. Paul. (AR 2405; see AR 3437 [freight easement reserved], 3348–3436 [UPRR conveys freight easement to IPH], 2961 [IPH agrees to convey freight easement to St. Paul], 3163.) Nor has STB approved RTC as a common carrier. (AR 3585–3589; RTC's Request for Judicial

Notice and supporting Decl. of Sabrina V. Teller (Teller Decl.), Exh. A [Oct. 22, 2018 STB Order stating RTC does not become a common carrier by entering into a revised ACL with a new operator].) Accordingly, the right to conduct freight rail operations, at whatever level it determines appropriate, is held by the (private) owner of the freight easement, i.e., the rail operator, whether that is UPRR, IPH, St. Paul, or any successive federally-approved common carrier—but not RTC. (AR 2405, 1199; see AR 2963, 3537, 2963, 3538 [section 2.3–no material interference], 2963 [same]; *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, 691 (*FOER*) [level of freight service is open to owners of the right to operate freight service]; see also Teller Decl., Exh. A.)

Pursuant to the federal Interstate Commerce Commission Termination Act (ICCTA) (49 U.S.C. § 10101 et seq.), *exclusive* jurisdiction over transportation rail carriers, "including the movement of goods and all services related to the movement," is held by the STB. (49 U.S.C. § 10501(b); *FOER*, *supra*, 3 Cal.5th at p. 711.) As further explained in St Paul's Opposition Brief, federal courts have concluded that ICCTA preempts state regulation or rail transportation, including state environmental clearance requirements. (See, e.g., *City of Auburn v. U.S. Government* (9th Cir. 1998) 154 F.3d 1025 [repairs and improvements to an existing freight line were exempt from state and local environmental regulation].) Nor does RTC have authority to modify a freight operator's activity in response to environmental concerns. (See *FOER*, *supra*, 3 Cal.5th at pp. 691, 711; see, e.g., 49 C.F.R. § 1105.6(b)(4)(i), (c)(1) [establishing thresholds for which changes in operation are subject to federal environmental review].) RTC has no right to interfere with that activity; it is wholly federally regulated.

Again, CEQA applies only to "discretionary" activities. (Pub. Resources Code, § 20180, subd. (a).) Courts apply a functional test that examines "whether the agency has the power to shape the project in ways that are responsive to environmental concerns." (*Friends of Juana Briones House*, *supra*, 190 Cal.App.4th at p. 302.) Regardless of any "terrible environmental consequences" of a given project, an agency is not required to prepare an environmental impact report (EIR) when it lacks the authority to address any of the environmental concerns that might be raised. (*Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 266–267, 273; *Leach v. City of San Diego* (1990) 220 Cal.App.3d 389, 394–395; *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 938–940 ("*San Diego Navy*"); *Mountain Lion Foundation v. Fish &*

Game Com. (1997) 16 Cal.4th 105, 117 ["unless a public agency can shape the project in a way that would respond to concerns raised in an EIR … environmental review [is] a meaningless exercise"].)

Here, RTC's discretionary authority is limited by ICCTA, which expressly preempts CEQA in these particular circumstances. (See Real Party in Interest's Opposition Brief, pp.7–8; AR 1197–1199, 2404–2406.) This state's Supreme Court explained in *FOER*, *supra*, 3 Cal.5th at p. 691 that, consistent with ICCTA's deregulatory purpose, "environmental decisions concerning track repair on an existing line and the level of freight service [are] within the regulatory sphere left open to owners" of the federal common carrier rights and obligations. ICCTA expressly preempts the use of state laws such as CEQA to restrict operations by a private rail carrier like St. Paul. (See *Id*. at p. 738.) Imposing mitigation on St. Paul, as Greenway urges, would serve as a regulation—by having a local agency dictate the actions of a private railroad operator—which would exceed RTC's limited jurisdiction over common carrier operations. (See Exh. A to Teller Decl. ISO RTC's RJN [STB Order finding that by expressly recognizing inability to interfere with freight service, the revised ACL does not "unduly interfere" with or "materially impair" successor private carrier's rights under the freight easement].) Even if, for the sake of argument, RTC were to prepare an EIR exploring the effects Greenway alleges the operation and repair of the line may cause, RTC lacks authority to impose or enforce any mitigation to minimize or avoid the claimed impacts. Thus, environmental review of the ACL would be nothing more than a fruitless exercise and waste of taxpayer dollars. (CEQA Guidelines, §15003, subd. (g) ["[t]he purpose of CEQA is not to generate paper, but to compel government [decisionmaking] … with environmental consequences in mind"].)

The question of whether an activity constitutes a project subject to CEQA is a question of law, to be decided on undisputed facts in the record. (*UMMP*, *supra*, 245 Cal.App.4th at p. 1273.) Here, the record indisputably demonstrates that the right and authority to control the activities of the rail carrier are vested in the federal government. CEQA simply does not apply to RTC's choice of St. Paul to replace IPH to carry out RTC's legal obligation to continue existing freight service.

B. The 2018 ACL falls squarely within the scope of the Class 1 exemption.

Even if RTC's approval of the ACL were not federally preempted, it is exempt from CEQA. The Class 1 categorical exemption applies to "the operation, repair, maintenance, permitting, leasing,

licensing or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." (CEQA Guidelines, § 15031.)

"[T]he continued operation of an existing facility without significant expansion of use … [is] exempt from CEQA review under CEQA Guidelines section 15301[.]" (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 326 (*CBE*); *North Coast Rivers Alliance v. Westlands Water Dist.* 227 Cal.App.4th 832, 867–868 (*NCRA*) [Class 1 exemption applies for the continued use of water facilities at historic levels]; *World Business Academy v. California State Lands Comm.* (2018) 24 Cal.App.5th 476 (*World Business Academy*) [Class 1 exemption applies to lease renewal]; *Turlock Irrigation Dist. v. Zanker* (2006) 140 Cal.App.4th 1047, 1065–1067 (*Turlock Irrigation Dist.*) [modified water delivery rules did not permit expansion of previous use].) Approving a license for an existing facility "falls squarely within the … language of the Class 1 categorical exemption." (*Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, 1312 (*Bloom*).

Freight service is already operating on the Branch Line and was well before RTC acquired its rights in the line. (AR 1199, 3695–3696 [2010 NOE], 3162 [IPH operating freight service since 2012], 3241–3258 [freight carloads handled by IPH per quarter], 3084–3085 [same].) After IPH became unable to operate, RTC selected a replacement operator, St. Paul, to maintain the status quo, i.e., to continue existing freight service. (*World Business Academy*, *supra*, 24 Cal.App.5th at pp. 483–484 [Class 1 exemption applies to lease replacement intended to maintain status quo]; AR 1199, 640, 501 [agenda item 20 for replacement operator].) Accordingly, RTC appropriately determined that the ACL qualified for the Class 1 exemption. (AR 1, 12–13.)

1. The ACL will not "significantly expand" freight use on the Branch Line.

Greenway claims that the Class 1 exemption does not apply because the ACL will significantly expand freight use on the Branch Line. (Petitioner's Opening Brief (POB), pp. 15–19.) Greenway's assertion that choosing a replacement operator for private rail service itself causes an increase or expansion in service is wrong. (POB, pp. 20–21.) RTC has a commitment to the State to continue freight rail service on the Branch Line until STB authorizes otherwise. (AR 1199, 2428–2432, 2433–2437, 1203, 57–58.) Procuring a replacement operator was therefore critical for RTC to continue

meeting that obligation and further to avoid potential liability for repayment of State funds. (*Ibid*.)

Though Greenway asserts otherwise, St. Paul was not selected due to its "focus[] on freight." (POB, pp. 20–21.) RTC's selection of St. Paul was the result of a competitive procurement process based on the proposer's ability to meet objective evaluation criteria—none of which was aimed to an ability to increase freight service. (See AR 504–506, 3162–3258 [RFP], 3175 [evaluation criteria], 3164–3168 [proposal requirements].) Rather, RTC focused on the candidate operators' ability to meet the needs of existing customers on a consistent basis, not to expand freight service. (AR 3166 ["provide[] optimal service to freight customers, and … to ensure consistency of freight rail service"].) Any increase in freight service on the Branch Line, even if significant,[8] cannot be attributed to RTC's approval of the ACL; instead, if the market supports it, service could be restored to the previous levels.

Nor does RTC have any regulatory authority over the level or frequency of freight service operated by the holder of the freight easement. If St. Paul (or any other federally-approved common carrier) wishes to pursue freight service in accordance with its rights under the freight easement—it does so subject only to regulation by the STB. (See *FOER, supra*, 3 Cal.5th at pp. 691, 711; see, e.g., 49 C.F.R. § 1105.6(b)(4)(i), (c)(1) [establishing thresholds for which changes in operation are subject to federal environmental review].) RTC may not interfere with that activity, which is entirely within the realm of federal regulation. ICCTA "remedies are exclusive and expressly preempt state remedies 'with respect to regulation of rail transportation."' (*FOER, supra*, 3 Cal.5th at p. 711, quoting 49 U.S.C. § 10501(b).) Thus, as expressly provided in the ACL, RTC's remedy is not to interfere with freight operations—but instead simply to terminate the agreement—in which case St. Paul would still have the right to operate freight service, subject to the freight easement and STB regulation. (AR 1199; see AR 2978 [section 8.2], 2963 [section 2.3]; see also AR 3538 [section 2.3], 3556–3557 [sections 8.1, 8.2].)

RTC's purpose in approving the replacement ACL was to continue requiring a minimum level of freight service to enable it to meet its commitment to the State. (See AR 1199, 2437, 2978, 3556–3557, 57–58.) The ACL obligates St. Paul to provide "regular freight service" defined in terms of minimum thresholds. (AR 1199, 2978 [ACL, § 8.2].) At its peak in year four, St. Paul is obligated to

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[8]/ The record lacks evidence to suggest that any expansion in freight service is even feasible. (See AR 2802, 3704, 3710, 3711.)

handle 250 freight cars per year. (AR 2978.) This is well below the average of 352 freight cars per year previously handled by IPH. (See AR 3084–3085, 3241–3258, 3344–3345; see AR 2406.) The ACL requires no change in or expansion of freight service. (AR 670–671, 1199.) Nor does the ACL contemplate any new services not previously provided by IPH. (AR 670–671; see AR 3535–3584 [2012 ACL authorized freight and passenger service], 2406, 2961–2998 [Phase I authorizes freight service and Phase II authorizes passenger service], 3172 [IPH operated freight and passenger service].)

Greenway cites cases that, in contrast, involve situations where the project resulted in a change to the project purpose, or an entirely new process. (POB, pp. 18–19; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 966–967 [project purpose changed to allow substantial increase in water use]; *CBE, supra*, 48 Cal.4th at p. 326 [project would have added new refining process requiring installation of new equipment].) The remaining cases, *World Business Academy*, *NCRA*, and *Turlock Irrigation Dist.* (see POB, pp. 18–19), upheld the agencies' use of the Class 1 exemption where, like here, there was no expansion of existing use.

Greenway claims that repairs required under the ACL are harbingers of expanded freight use. (POB, p. 17.) Not so. The ACL contemplates two phases of repairs corresponding with the two-phased nature of the agreement. (AR 2971 [section 5.1].) Phase I work (up to MP 7.0 [AR 2971]) includes emergency repair of storm-damaged portions of the line, as well as deferred maintenance and repairs associated with IPH's breach of its maintenance obligation. (See AR 3088–3089, 13–14, 507–508, 3173–3174, 559–561.) RTC's obligation to upgrade the remainder of the line to Class 1 track classification arises only if passenger service is authorized, i.e., Phase II is triggered, and is for the purpose of providing increased passenger service—not freight service. (AR 2971, 2964, 647.)[9] Greenway omits this fact.

Greenway's remaining arguments are equally unavailing. (POB, pp. 16–17.) That St. Paul boasts a "tried-and-true approach" to revitalizing underutilized rail lines in other geographic regions has no bearing on the ACL. (*Ibid*.) Freight operations fluctuate due to market forces outside the control of

[9]/ Phase II repairs are statutorily exempt under Public Resources Code section 21080, subdivision (b)(10) as "[a] project for the institution or increase of passenger or commuter services on rail … rights-of-way already in use[.]" (See AR 1200.)

St. Paul or RTC. (See, e.g., AR 3697–3765 [economic analysis of Branch Line operations], 3862–3888 [same].) Greenway cites no evidence indicating that expansion of the freight service on the Branch Line is foreseeable. Indeed, the record shows that there is reduced demand for increased freight service due to the cement plant closure in 2010. (See AR 2802 [CEMEX closed, no freight demand north of Watsonville], 3704 [CEMEX was largest shipper in the corridor], 3710 [freight traffic directly tied to CEMEX], 3711 [viability of freight service dependent on CEMEX].) The statements by St. Paul regarding its past performance and its aspirational goals are at best a compelling sales pitch. They are not substantial evidence of any foreseeable impacts of the ACL—particularly where the facts support otherwise. (See Pub. Resources Code, § 21080, subd. (e) [substantial evidence includes "reasonable assumption predicated upon fact," not "speculation, unsubstantiated opinion or narrative"]; *Rodeo Citizens Assn. v. County of Contra Costa* (2018) 22 Cal.App.5th 215, 222–223 [lead agency appropriately discounted applicant's media comments about its business plans that would have altered project lead agency was actually approving].) Greenway also claims that St. Paul was selected specifically because of its "ability to expand freight service." (POB, p. 17.) The RFP and the ACL directly refute this claim. (See AR 504–506, 3162–3258, 3175, 3164–3168.)

Substantial evidence supports RTC's conclusion that the ACL does not result in an expansion of freight use and therefore falls squarely within the scope of the Class 1 exemption. While not "all projects related to 'existing facilities' qualify for the Class 1 exemption" (POB, p. 19), the ACL does.

2. The average level of freight service over the past four years is an appropriate baseline for purposes of applying the Class 1 exemption.

Citing no legal authority, Greenway argues that CEQA's baseline concept has no application here. (POB, pp. 15–16, 19–21; see *Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 477, fn. 4 [failure to cite legal authority forfeits argument].) Case law holds otherwise.

The "existing conditions" language in the Class 1 exemption (CEQA Guidelines, § 15301) has been used interchangeably with the concept of environmental baseline—which are physical conditions existing at the time the agency approves a project from which the impacts of the project are measured (CEQA Guidelines, § 15125, subd. (a); see, e.g., *NCRA*, *supra*, 227 Cal.App.4th at pp. 872–873, citing *Bloom*, *supra*, 26 Cal.App.4th at pp. 1311–1312, 1315.) As the Supreme Court has twice recognized,

"'[t]he date for establishing baseline cannot be a rigid one. Environmental conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods.'" (*CBE, supra*, 48 Cal.4th at pp. 327–328; *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 470 (*Neighbors for Smart Rail*).) The key goal is to provide an accurate reflection of the conditions under which a project will operate so as not to mislead the public or decisionmakers regarding potential impacts. (*CBE*, *supra*, 48 Cal.4th at pp. 322, 325, 328; *Neighbors for Smart Rail*, *supra*, 57 Cal.4th at pp. 449–452.)[10]

Where conditions fluctuate over time, courts have upheld the use of a historic baseline, subject to the substantial evidence standard of review. (*North County Advocates v. City of Carlsbad* (2015) 241 Cal.App.4th 94, 101–106 [shopping center's historical full occupancy was proper baseline for traffic impact analysis]; *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 336–340 [water allocation approximating the property's recent historical use constituted a realistic measure of existing conditions]; *San Francisco Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal.App.4th 202, 218–219 [use of reasonable approximation over time to describe existing operations was appropriate]; *Association of Irritated Residents v. Kern County Bd. of Supervisors* (2017) 17 Cal.App.5th 708, 728–729 (*AIR*).) Greenway does not cite to, much less distinguish, these cases.

AIR is particularly relevant. There, although refinery operations were shut down during bankruptcy proceedings, the court upheld the use of a baseline that included the previously operating facility because permits allowing operations were still in effect and the refinery had operated up until the bankruptcy filing. (*AIR*, *supra*, 17 Cal.App.5th at pp. 728–729.)

This case presents a very similar set of circumstances. Although Greenway claims otherwise

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[10]/ The 1998 amendment to CEQA Guidelines section 15301 for which Greenway seeks judicial notice is irrelevant and fails to support their argument. (See POB, pp. 20, fn. 8.) The language "at the time of agency's determination" is consistent with Guidelines section 15125, subdivision (a), which states that the point from which a project's impacts are *normally* measured is "at the time notice of preparation is published" or "at the time the environmental analysis is commenced," which as noted *infra*, has gained increased flexibility in recent case law. (See, e.g., *Neighbors for Smart Rail*, *supra*.) The principles from these recent cases which should apply equally to exemptions as a fundamental underpinning of CEQA, are that (1) decisionmakers should be provided realistic, not hypothetical, information, and (2) the baseline for analysis may be chosen for that purpose where substantial evidence supports an approach other than conditions existing exactly when environmental review commences.

(POB, pp. 15, 19), freight service never stopped completely.[11] The entitlement committing IPH to a minimum level of freight service (the 2012 ACL) remains in effect until STB approves transfer to a new operator. (AR 655, 3556 [section 8.2]; see AR 2406.) Moreover, IPH's federal common-carrier obligations remained unaffected by its financial difficulties. Substantial evidence supports RTC's reliance on a recent average level of freight operations as the baseline. Therefore RTC correctly describes the approval of the ACL with St. Paul as the continued operation or leasing for an existing facility qualifying for the Class 1 categorical exemption from CEQA.

C. The Class 2 exemption is applicable to the repairs on the Branch Line, and in any event, Greenway's challenge to these repairs is not timely.

RTC determined that repairs of the Branch Line up to MP 7.0 (AR 2971 [Phase I repairs]) qualified for the Class 2 exemption. (AR 12, 1200.) The Class 2 exemption applies to the "replacement or reconstruction of existing structures and facilities where the new structures will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced[.]" (CEQA Guidelines, § 15302.) Greenway claims the ACL will change the "'purpose or capacity'" of the Branch Line because "Progressive intends to dramatically increase the amount of freight" service. (POB, pp. 21–22.) Greenway is incorrect.

RTC acquired its rights in the Branch Line under an obligation to continue existing freight service—which is specifically why those repairs were needed regardless of the identity of the operator. (See AR 2432, 2971.) The Phase I repairs are strictly necessary to correct existing storm damage and maintenance issues for the purpose of continuing freight operations. (See AR 2963 [Phase I is freight service only], 650 [same]; Section IV.B, *supra*.)[12]

As further explained above, the record lacks evidence that the ACL will "dramatically increase the amount of freight currently operating on the line." (POB, p. 21; see Section IV.B, *supra*.) Any increase in freight service is incidental to the ACL—subject only to St. Paul's privately-held freight

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[11]/ Historic levels of rain and flooding in 2016–2017 caused a washout, resulting in service north of approximately MP 5.0 being temporarily suspended and necessitating federal disaster assistance (See AR 2406, 3088–3089, 3173–3174, 2337–2340, 3309–3311.)

[12]/ In Phase II, the Branch Line would be upgraded to Class 1 track classification to accommodate increased passenger service (not freight service)—improvements which are likewise exempt under Public Resources Code section 21080, subdivision (b)(10). (AR 2971.)

easement and the STB's authority, not RTC's. (AR 1199, Section IV.A–B, *supra*.)

Greenway's reliance on *Save Our Carmel River, supra*, 141 Cal.App.4th at pp. 697–699 is unavailing. (POB, p. 21–22.) There, the court held that the Class 2 exemption did not apply to a water credit transfer because it was not a structure or a facility. (*Id*. at p. 697.) But unlike in the instant matter, there was no evidence that the "replacement structure" would be built on the same site. (*Id*. at p. 698.)

Substantial evidence supports RTC's application of the Class 2 exemption and it therefore must be upheld. (*Davidon, supra*, 54 Cal.App.4th at p. 115 [exemption "will be affirmed if supported by substantial evidence that the project fell within the exempt category of projects"].) That fact aside, Greenway is too late to challenge the storm damage repair work under CEQA, which RTC committed to well before and outside the scope of the ACL approval. (AR 3309–3311, 499, 3091.) RTC decided in April 2017 to seek federal assistance to complete the emergency repair work and subsequently submitted the application. (AR 3312, 3309–3311.) RTC made the public decision on January 18, 2018 to select an engineering firm to prepare construction documents for restoration of the line. (AR 3091, 499.) Greenway therefore had not one, but two opportunities to challenge the Phase I repairs it belatedly objects to now. It did not timely do so then, and cannot now use the ACL as an end-run around CEQA's statute of limitations. (See Pub. Resources Code, § 21167, subd. (d).) Thus, RTC conservatively approved categorical exemptions and posted an NOE in June 2018, which included discussion of the previously authorized repair work, but the discretionary decision to seek funding for and implement that repair work had been made over a year prior and was not timely challenged.

D. Greenway fails to meet its burden to show that the unusual circumstances exception to the exemption applies.

1. The standard of review is deferential to RTC's determinations.

As noted above in the discussion of the standard of review, the California Supreme Court established that petitioners have two alternative methods to prove the unusual circumstances exception applies. (*Berkeley Hillside I, supra*, 60 Cal.4th at p. 1105; *Citizens, supra*, 242 Cal.App.4th at pp. 574–576; *Walters, supra*, 1 Cal.App.5th at pp. 819–823.) Greenway satisfies neither approach.

Under the first method, a challenger must prove both (1) unusual circumstances that distinguish the project from others in the exempt class and (2) a significant environmental effect that is due to those

circumstances. (*Berkeley Hillside I*, *supra*, 60 Cal.4th at pp. 1105, 1115; *Citizens*, *supra*, 242 Cal.App.4th at p. 574.) The determination of whether there are "unusual circumstances" (i.e., whether the project presents circumstances that are unusual for projects in an exempt class) is a factual inquiry reviewed under the deferential "substantial evidence" standard. (*Berkeley Hillside I*, *supra*, 60 Cal.4th at p. 1114.) '"[F]or the unusual circumstances exception to apply, it is not alone enough that there is a reasonable possibility the project will have a significant environmental effect; instead, in the words of the Guidelines, there must be "a reasonable possibility that the activity will have a significant effect on the environment *due to unusual circumstances*."'" (*Aptos Residents Assn. v. County of Santa Cruz* (2018) 20 Cal.App.5th 1039, 1054.) Where, as here, RTC determined, based on substantial evidence in the record, that there are no unusual circumstances, the Court must uphold RTC's determination.

Under the second method, a challenger "may establish an unusual circumstance with evidence that the project will have a significant environmental effect." (*Berkeley Hillside I*, *supra*, 60 Cal.4th at p. 1105.) "But a challenger must establish more than just a fair argument that the project will have a significant environmental effect. [Citation]. A party challenging the exemption must show that the project *will* have a significant environmental impact." (*Citizens*, *supra*, 242 Cal.App.4th at p. 576.) No case has yet explained how to show that there *will* be significant adverse impacts under this standard, but Greenway made no showing at all beyond its own conclusory allegation. That is not enough.

Regardless of method, the challenger bears the burden of proof to demonstrate that an exception to an exemption applies. (*Save Our Schools v. Barstow Unified School Dist. Bd. of Ed.* (2015) 240 Cal.App.4th 128, 139.) Greenway cannot meet its burden under either method. (See POB, pp. 22–27.)

2. Substantial evidence supports RTC's determination that there are no unusual circumstances.

"Unusual circumstances" refer to "some feature of the project that distinguishes [it] from other features in the exempt class." (*Walters*, *supra*, 1 Cal.App.5th at p. 819.) Here, RTC considered whether the approval of the ACL was an unusual circumstance, concluding the answer was "no." (AR 13, 2407, 1200–1202.) Indeed, because RTC owns the Branch Line, but is not a common carrier—entering an ACL to govern the relationship between RTC and the railroad operator is quite common. (See AR 205,

1206, 1207, 3163–3164, 2405–2406.)[13] The STB has approved similar arrangements on several occasions. (See, e.g., *Maine Dept. of Transportation–Acquisition & Operation Exemption–Maine Central Railroad* (STB 1991) 8 I.C.C.2d 835; *Michigan Dept. of Transportation–Acquisition Exemption–Certain Assets of Norfolk Southern Railway Co.* (STB 2012) FD 35606 [2012 WL 1244513]; *Massachusetts Dept. of Transportation–Acquisition Exemption–Certain Assets of CSX Transportation, Inc.* (STB 2009) FD 35312 [2009 WL 6408804]; see AR 1207–1208 [RTC's transaction complied with *State of Maine* and its progeny].) Courts have rejected unusual circumstances claims where the presence or use of facilities at issue is commonplace. (See *Bloom, supra*, 26 Cal.App.4th at pp. 1315–1316 [presence of comparable facilities supports implied finding that there are no unusual circumstances]; *San Francisco Beautiful v. City and County of San Francisco* (2014) 226 Cal.App.4th 1012, 1024–1026 [petitioner failed to show utility boxes in urban setting were "unusual circumstances" that triggered exception]; *City of Pasadena v. State of California* (1993) 14 Cal.App.4th 810, 826–824 [building use as a parole office did not constitute an 'unusual circumstance' in light of presence of similar facilities nearby].) Because substantial evidence supports RTC's conclusion, it must be upheld. (*Berkeley Hillside I, supra*, 60 Cal.4th at p. 1114 [agency determination that there are no unusual circumstances reviewed for substantial evidence].)

Greenway's argument that the repair work on the Branch Line will be undertaken in a sensitive location thereby constituting an "unusual circumstance" is immaterial. (POB, pp. 24–27.) Rail lines, like roadways traverse all sorts of conditions including wetlands and rivers and it is therefore quite common that repair work takes place in such locations. Repair work required as part of Phase I (up to MP 7.0) is statutorily exempt from CEQA as emergency repairs and insulated from challenge under CEQA.[14] (See Pub. Resources Code, § 21080, subd. (b)(2); AR 3088–3089, 522–523, 2406, Section IV.B, *supra*.) Repairs north of MP 7.0, contemplated as part of Phase II, are likewise statutorily exempt. (See Section IV.B, *supra*; Pub. Resources Code, § 21080, subd. (b)(10).) Where the Legislature creates a complete exemption from CEQA, it has determined that no environmental review

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[13]/ Moreover, the revised ACL is nearly identical to the previous one with IPH. (AR 2961–2998; cf. AR 3535–3585; see also Exh. A, Teller Decl. [STB Order, p. 3 (Revised ACL "substantially the same")].)

[14]/ "'Emergency' includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as occurrences as riot, accident or sabotage." (Pub. Resources Code, § 21060.3.)

is necessary regardless of potentially significant effects. (See *Del Cerro*, *supra*, 197 Cal.App.4th at p. 184 [“courts ‘do not balance the policies served by statutory exemptions against the goal of environmental protection’”].)

Even if the emergency exemption did not apply, the cases Greenway cites are distinguishable. (POB, pp. 25–26.) In *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1193–1194 the court held that a landfill was not a “facility” within the meaning of the Class 1 exemption. That aside, the unusual circumstance was the specific statutory requirement that pre-existing landfills be reclassified because of their potential to create environmental impacts. (*Id*. at pp. 1206–1209. In *McQueen v. Bd. of Directors* (1988) 202 Cal.App.3d 1136, 1149, the court reasoned, “the known existence of … hazardous wastes on property to be acquired is an unusual circumstance threatening the environment.” (See *Citizens*, *supra*, 242 Cal.App.4th at p. 584 [distinguishing *McQueen* from cases where, like here, the focus is on continued operations].)

3. There is no evidence that there would be any significant environmental impact due to unusual circumstances.

Even if Greenway had shown “unusual circumstances,” they must also establish that, *due to* those circumstances, the project may have significant impacts. (*Berkeley Hillside I*, *supra*, 60 Cal.4th at pp. 1114–1115; *Aptos Residents Assn.*, *supra*, 20 Cal.App.5th at pp. 1048–1049.) The only evidence they cite, however, consists of general information regarding the proximal location of potentially sensitive resources. (POB, pp. 26–27.) That is not enough.

The record shows FEMA determined the storm damage repair work would have no adverse impacts to wetlands, federally-listed threatened and endangered species or critical habitat, migratory birds, and was exempt from wetland and floodplain review. (AR 2335.) It further determined the repair work is statutorily excluded from National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 et seq.) review in accordance with section 316 of the Stafford Act (42 U.S.C. § 5159), which waives NEPA procedures for certain federal actions carried out in an emergency or disaster area. (AR 2334.)

Moreover, any work that takes place in sensitive areas, such as wetlands or habitat for special-status species, would have to comply with applicable state and federal laws and regulations requiring avoidance or minimization of permanent or significant impacts. (See, e.g., 16 U.S.C. § 1531 et seq.

[Endangered Species Act]; 33 U.S.C. § 1251 et seq. [Clean Water Act]; Fish & G. Code, § 2050 et seq. [California Endangered Species Act]; Pub. Resources Code, § 30000 et seq. [California Coastal Act]; see also AR 3987–3989 [regulatory framework].) Any repairs undertaken at the direction of FRA are further subject to NEPA. As long as the repair work complies with the applicable state and federal laws, there will be no potentially significant environmental effect.

Greenway's bald speculation that such work would not comply with applicable law does not constitute substantial evidence. (See Pub. Resources Code, § 21080, subd. (e)(2) [substantial evidence is not speculation]; *Friends of Riverside's Hills v. City of Riverside* (2018) 26 Cal.App.5th 1137 (*Friends*) [claims that do not show a violation of law do not constitute a fair argument that project could have a significant impact]; *Jensen v. City of Santa Rosa* (2018) 23 Cal.App.5th 877, 895–897 [rejecting noise impact claims, in part, because they assumed that local restrictions would be ignored or ineffective].) CEQA requires no presumption that a project will violate applicable law.[15]

4. Greenway fails to show the ACL *will* have significant environmental effects.

As a threshold matter, Greenway's argument relies on the faulty presupposition that the ACL increases freight use, which it does not. (See Section IV.B, *supra*; POB, pp. 22–24.) In any event, Greenway fails to cite substantial evidence showing a potential for environmental impact, let alone that the ACL *will* have significant effects. (See *Berkeley Hillside I*, *supra*, 60 Cal.4th at p. 1105 [potential for impact does not equal unusual circumstances]; *Citizens*, *supra*, 242 Cal.App.4th at p. 576.)

When RTC acquired the line, it determined that the action was exempt from CEQA review (AR 3695–3696)—a determination that was never challenged. Similarly, no one challenged IPH as the initial railroad operator. The ACL simply replaces IPH with St. Paul, obligating St. Paul to a minimum level of freight service below recent average levels. (AR 670–671, 1199; see AR 3535–3584, 2961–2998, 3172, 3084–3085, 3241–3258, 2406; Section IV.B, *supra*.) Nothing else changes. Thus, substantial evidence supports RTC's determination that continued operation of freight service by St. Paul under the ACL would result in no significant environmental effect.

Greenway, however, claims the ACL will "create significant noise impacts." (POB, pp. 22–24.)

[15]/ Similar to petitioners in *Friends*, *supra*, 26 Cal.App.5th 1137, Greenway is not without recourse to address its concerns (POB, pp. 26–27) if, in fact, RTC or St. Paul fails to comply with applicable laws.

Relying on a 2005 study analyzing the noise impacts of passenger service, not freight service, their argument compares apples to oranges—not substantial evidence. (*Ibid*; AR 1862–1889 [2005 study]; see *Jensen, supra*, 23 Cal.App.5th at pp. 892–895 [method for calculating noise impact of a project, different from the one being challenged, was not substantial evidence of a noise impact].)[16] Most glaringly, the number of train cars that would occur under the passenger alternative analyzed was substantially higher than the number of cars contemplated to be handled by the ACL—4,320 passenger cars per year versus 250 freight cars per year.[17] (See AR 1882 [18 trains/day for 120 days/year], 1863 [two cars per train]; cf. AR 2978 [250 freight cars per year.)[18] For evidence to be substantial, it must be supported by fact. (Pub. Resources Code, § 21080, subd. (e).) Greenway's allegation is not.

That a completely different, statutorily-exempt project has the potential to result in noise impacts is not substantial evidence that the continued operation of freight service by a different private operator under the ACL will have a significant environmental effect. Greenway fails to meet its burden to show that the unusual circumstances exception applies under this method.

V. CONCLUSION

CEQA does not apply to RTC's approval of the ACL for several reasons, not the least of which is the fact that federal law preempts CEQA in these specific circumstances. Even if federal law did not preempt RTC's authority to impose any environmental mitigation, the decision to transfer the right to operate freight service from one private operator to another, as well as to implement repairs to the line that would be necessary regardless of the operator, are categorically exempt under CEQA, and no evidence supports a determination that these actions are subject to any potential exceptions to the exemptions. RTC therefore respectfully requests that the Court deny Greenway's petition in its entirety.

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[16]/ Potential noise impacts resulting from instituting passenger service on the Branch Line are immaterial. To the extent the ACL increases passenger rail service, it is statutorily exempt from CEQA. (See Pub. Resources Code, § 21080, subd. (b)(10).) "'[A] project that falls within a statutory exemption is not subject to CEQA even if it has the potential to significantly affect the environment.'" (*Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173, 184 (*Del Cerro*).)

[17]/ In year 4 and beyond, the minimum freight traffic is 250 cars/year (less than one a day). (AR 2978.)

[18]/ The 2005 noise study analyzed a second passenger alternative, which would have resulted in 768 passenger cars per year—more than 500 additional train cars compared to the ACL. (AR 1882[8 trains/day for 48 days/year], 1863 [two-cars per train].)

DATED: October 29, 2018

Respectfully submitted,

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By: _____

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SANTA CRUZ COUNTY REGIONAL
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Santa Cruz County Greenway v. Santa Cruz County Regional Transportation Commission
Santa Cruz County Superior Court, Case No. 18CV02101

PROOF OF SERVICE

I, Judith A. Salas, am employed in the County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, California 95814, and email address is jsalas@rmmenvirolaw.com. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with Remy Moose Manley, LLP's practice for collection and processing mail whereby mail is sealed, given the appropriate postage and placed in a designated mail collection area. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

On October 29, 2018, I served the following:

RESPONDENT'S OPPOSITION TO PETITIONER'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE;

DECLARATION OF SABRINA TELLER IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF JOINT OPPOSITION TO PETITIONERS' OPENING BRIEF; and

RESPONDENT'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF OPPOSITION BRIEF

☐ **BY FIRST CLASS MAIL** by causing a true copy thereof to be placed in a sealed envelope, with postage fully prepaid, addressed to the following person(s) or representative(s) as listed below, and placed for collection and mailing following ordinary business practices.

☐ **BY OVERNIGHT DELIVERY** by causing a true copy thereof to be placed in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person(s) or representative(s) as listed below, and deposited in a dropbox or other facility regularly maintained by the express service carrier.

☒ **BY ELECTRONIC TRANSMISSION OR EMAIL** by causing a true copy thereof to be electronically delivered to the following person(s) or representative(s) at the email address(es) listed below. I did not receive any electronic message or other indication that the transmission was unsuccessful.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed this 29th day of October, 2018, at Sacramento, California.

Judith A. Salas

Santa Cruz County Greenway v. Santa Cruz County Regional Transportation Commission
Santa Cruz County Superior Court Case No. 18CV02101

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